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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ROBERT CRAWFORD, Defendant and Appellant.	D054861 (Super. Ct. No. SCD212693)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed.

A jury convicted defendant Thomas Crawford of two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a))[1] and found true the allegations that Crawford had engaged in substantial sexual contact with the victim, who was under the age of 14 (§ 1203.066, subd. (a)(8)). On appeal, Crawford asserts the evidence was insufficient to

1 All further statutory references are to the Penal Code unless otherwise specified.

support the true findings on the substantial sexual contact allegation, and the court's instructions to the jury were inadequate.

FACTS

A. Prosecution Case

In November 2007 M. (then under the age of 14) lived with her mother (Mother) and Crawford (her stepfather) in San Diego, California. In early December 2007, M.'s teacher noticed she had been crying in class. The teacher and M. stepped out of the classroom, and M. told her teacher that Crawford had come into M.'s room on more than one occasion and touched her. Her teacher and the school contacted Child Protective Services and reported the molestation.

A social worker, Ms. Maier, went to the school in response to the report and interviewed M. on December 19, 2007. M. told Ms. Maier that Crawford had touched her on two occasions while she was in her bed. M. reported that, on the first occasion, she was in bed and was drifting off to sleep when she felt someone move her leg to one side and touch her vaginal area. She moved her legs back together but someone moved her legs apart again and touched her vaginal area. M. woke and saw Crawford in her room, standing at the window. On the second occasion, M. was again in bed when she felt someone touching her vaginal area and felt the hand moving toward her breasts. She awoke and saw Crawford leaving her bedroom.

Later that afternoon, a neighbor of M.'s family (Mrs. Clarke) was home when a Child Protective Services representative knocked on her door looking for M. and her

siblings. Mrs. Clarke called Mother at her place of work and told her about the visitor, and both Mother and M. came to the Clarkes' home later that afternoon. M. and Mother were upset and crying, and Mrs. Clarke overheard Mother accuse M. of lying. Mother then left the Clarke's residence to go home to talk to Crawford. When she returned to the Clarke's residence, Mother hugged M. Mother also stated she wanted to kill Crawford and began rummaging through the Clarkes' cupboards, where she eventually found and took a screwdriver before returning to her house.

Mr. Clarke followed Mother back to her house to make sure everything was all right. When he entered, Mother was screaming at Crawford while brandishing the screwdriver, and Crawford said, "I know, I know. I deserve to go to jail, but you don't have to stab me." Mr. Clarke grabbed Mother and took her back to his house.

Later that evening, police arrived and began taking statements. Officer Lawrence spoke with M. M. told Lawrence that, in the first incident, she had fallen asleep on the bed. She was lying on her stomach and was still wearing her blouse, skirt and panties. She awoke to find Crawford moving her legs apart. Crawford, using three fingers, had touched her (over the top of her panties) in a swiping motion from her vagina up to the lower or middle portion of her back. She reacted by closing her legs, but Crawford moved her legs apart and repeated the touching. When she rolled over to look at her cell phone to check the time, he moved away toward the window. In the second incident, described by M. to Lawrence as occurring approximately one week later, M. stated she was in bed, sleeping on her back and wearing pajamas, when she woke to find Crawford

pulling her leg up. He then touched her breasts on top of her pajamas and pushed them up but, when she quickly rolled over, Crawford left the room.

Another officer investigating the allegations that evening, Officer Macawili, spoke to Crawford and asked if he knew why the police were there. Crawford responded that he had "messed up" and was sorry. Macawili recited to Crawford his *Miranda*[2] rights and Crawford agreed to talk to him. Crawford stated there was one incident, when he was putting M. to bed, approximately two months earlier. He told police that he went into her room to tuck her in and:

> I felt her buttocks area. I don't remember which side. I touched her from the outside of her clothing. I didn't say anything to her and she didn't say anything to me. I heard noises outside. So I looked out her window. [M.] appeared to be looking at her cell phone. I walked out of her room. This has never happened before. It only happened once . . . . I can't explain [it]. I messed up. Whatever happens, happens. I deserve it."

Mrs. Clarke's son, Trevor, was friends with M. On three or four occasions, M. told Trevor that Crawford had touched her. She felt "confused" about it at first, but later told Trevor she was sure Crawford had touched her but was unsure what to do about it. She never recanted to Trevor or told him that she had lied about what Crawford had done.

About one week after police had been to Crawford home, Mrs. Clarke went to Crawford's home to deliver some Christmas gifts. M. and Mother were arguing, and Mother yelled at M. to "go f---ing in your room, get the f--- away from me." Mother then looked over at M.'s brother and said, "look at your brother, because of you he doesn't

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2 *Miranda v. Arizona* (1966) 384 U.S. 436.

have a father, because of you your dad's not here for Christmas because of your lies." She called M. a "f---ing bitch" and said that M. was going to cause Mother to lose her house, her car and her husband. Mrs. Clark testified that M. called her on several subsequent occasions to ask for help because M. and Mother were arguing. On one occasion, Mother told M. that Crawford had been arrested because of M.'s lies, and the family was going to lose their home because of her. M. later told Mrs. Clarke that she wanted to run away because her mother did not believe her and preferred to believe Crawford instead of her own daughter.

At trial, M. recanted her accusations and testified she had fabricated the accusations because her parents were punishing her for her bad grades. She testified she told Trevor a "lie" about her stepfather. She did not recall telling the social worker or the police officer that Crawford had touched her. She told the prosecutor that the incidents never occurred, and that she "couldn't go on with it" and was "tired of lying." She denied that her mother cursed at her for reporting the incidents or blamed her for Crawford's arrest.

B. Defense Evidence

Crawford testified that, sometime in November, M. brought home a report card showing she was getting D's and F's. She tried to hide the report card, but when Mother found it, Crawford and Mother placed severe restrictions on her social life. About two weeks later, the accusations surfaced.

When Crawford arrived home on December 19, Mother was hysterical, brandished a screwdriver at him and yelled that he had touched M. Crawford told her that he had touched her but it was by accident. When police arrived Crawford tried to explain that he knew why they were there, and it was because he had he had accidently touched M.'s buttocks when he was tucking her in one night several months earlier. Crawford denied touching M. inappropriately. He also denied saying that he had "messed up," had "felt" her buttocks, did not know why it had happened or couldn't explain it, or saying "whatever happens, happens." He also denied saying he "deserved to go to jail." The defense also called character witnesses who described Crawford's integrity, character, reputation, and positive relationship with children.

ANALYSIS

A. Substantial Evidence Supports the True Finding

Crawford argues the finding of substantial sexual conduct under section 1203.066 must be reversed. Although Crawford asserts there is no evidentiary support for the finding, he does not claim there was no evidence that he touched M.'s genital area over her clothing. Instead, he argues this court's opinion in *People v. Chambless* (1999) 74 Cal.App.4th 773 (*Chambless*) that substantial sexual conduct may be found based on masturbation under section 1203.066, subdivision (b), by any touching or contact of the

genitals of the victim, however slight, was wrongly decided and slight touching cannot constitute substantial sexual conduct.[3]

In *Chambless*, this court examined the substantial sexual conduct requirement under the then-current version of the Sexually Violent Predators Act[4] and, after noting the Legislature took the definition of substantial sexual conduct under the SVPA (see former Welf. & Inst. Code, § 6600.1, subd. (b)) directly from section 1203.066, subdivision (b), held the definition of masturbation under the SVPA "encompasses any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent." (*Chambless, supra*, 74 Cal.App.4th at pp. 783, 786.) In so holding, *Chambless* stated masturbation is not an offense codified in the Penal Code, but that the word appeared to have been used in the Act "simply in its commonly understood meaning to describe the touching of one's own or another's private parts *without quantitative requirement* for purposes of defining conduct that was lewd or sexually motivated." (*Id*. at 784, fn. omitted, italics added.) *Chambless* relied, in part, on *People v. Grim* (1992) 9 Cal.App.4th 1240, in which the court considered the appropriateness of jury instructions concerning the sufficiency of the evidence to find substantial sexual conduct based on oral copulation as defined in section 1203.066. (*Grim*, at pp. 1241-1243.) *Grim* held the instructions telling the jury that " '[a]ny contact, however slight,

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3 Section 1203.066, subdivision (b), provides, " 'Substantial sexual conduct' means . . . masturbation of either the victim or the offender."

4 Welfare and Institutions Code section 6600 et seq. (the SVPA).

between the mouth of one person and the sexual organ of another person constitutes oral copulation' " and that penetration of the mouth was not required were proper for finding oral copulation sufficient to constitute substantial sexual conduct under section 1203.066. (*Grim,* at p. 1242.) Because section 1203.066 provided that masturbation as well as oral copulation can mean substantial sexual conduct, just as the SVPA then provided, *Chambless* reasoned "the Legislature intended the extent of touching of the genitals required to meet the definition of masturbation would also be the same as in *Grim.* Hence, any contact, however slight[,] of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn as substantial sexual conduct . . . ." (*Chambless,* at p. 787.)

Crawford argues the definition of masturbation employed in the instructions in this case, while correct under *Chambless,* cannot withstand scrutiny because substantial sexual conduct must be mean something more than *any* sexual conduct. Instead, Crawford asserts masturbation, as that term is used in section 1203.066, must mean something more than the minimal contact described in *Chambless*. We construe the words of a statute using their ordinary meaning (see, e.g., *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735), and the standard dictionary definition of masturbation, which is a term of common usage and so must be understood in its everyday meaning (see *People v. Snook* (1997) 16 Cal.4th 1210, 1215), contains no quantitative component to the duration of the stimulation of the genital area. (See, e.g., Webster's 3d New Internat. Dict. (1993) p. 1391 [defining masturbation as "erotic stimulation involving the genital organs

commonly resulting in orgasm and achieved by manual or other bodily contact exclusive of sexual intercourse, by instrumental manipulation, occas. by sexual fantasies, or by various combinations of these agencies"].) Additionally, we note *Chambless's* definition has since been relied on by several appellate courts. (See, e.g., *People v. Carlin* (2007) 150 Cal.App.4th 322, 333 [relying on the *Chambless* definition of masturbation in finding the prosecution's evidence of substantial sexual conduct to be sufficient, based on conduct like the fondling of a victim's penis]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 52 [quoting *Chambless*'s definition with approval]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [relying on *Chambless* to hold that masturbation does not require the direct touching of genitals but may be done through clothing].)

Crawford cites no persuasive reason for us to revisit *Chambless*. His central argument for overturning *Chambless* is that the contact-however-slight test for masturbation within the meaning of section 1203.066, subdivision (a)(8), would make every violation of section 288, subdivision (a), involving fondling of the genitals a crime also violating section 1203.066, subdivision (a)(8). However, as *Chambless* noted, a person can violate section 288, subdivision (a), *without* any genital touching, while "masturbation" as previously used in the SVPA *did* require genital touching. (*Chambless, supra*, 74 Cal.App.4th at pp. 785-786.) Thus, *Chambless* does not convert all section 288, subdivision (a), violations into section 1203.066, subdivision (a)(8), violations, but only does so when the former *includes* or involves genital fondling. We

conclude *Chambless* was correctly decided, and substantial evidence supports the true finding.

B. The Court Was Not Sua Sponte Obligated to Give a Misdemeanor Battery Instruction

Crawford also argues the court was sua sponte obligated to instruct on misdemeanor battery as a lesser included offense to the section 288, subdivision (a), counts.

Applicable Principles

"In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. Earp* (1999) 20 Cal.4th 826, 885.) "That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) However, *Breverman* cautioned "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id*. at p. 162.)

Alternatively stated, an instruction on a lesser included offense is not required when the evidence is insufficient to support a conviction of that offense. (*People v. Hawkins* (1995) 10 Cal.4th 920, 954, abrogated on another ground in *People v. Lasko*

(2000) 23 Cal.4th 101, 110.) "It is error . . . to instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, i.e., when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796.)

Analysis

We conclude the trial court was not sua sponte obligated to instruct on simple battery because the evidence, even construed most favorably to Crawford, would not have supported a finding of guilt of simple battery but would only support a finding that Crawford, if guilty at all, could only be guilty of violating section 288, subdivision (a).

M. described, and Crawford was charged with, two counts of lewd conduct. On the first occasion, she felt Crawford move her legs apart and use his fingers in a swiping motion from her vagina up to the lower or middle portion of her back, and when she reacted by closing her legs he moved her legs apart and repeated the touching. She woke up, checked her cell phone, and saw Crawford in her room standing at the window. Crawford's evidence at trial was that, while there *was* an occasion when Crawford was in M.'s room at the window when she checked her cell phone, Crawford claimed that before he went to the window he had *accidentally* grabbed M.'s buttocks while he was in the process of trying to grab some blankets to tuck her into bed.

On the second occasion, M. was again in bed, sleeping on her back, when she felt Crawford touching her vaginal area and felt his hand move toward her breasts. When she

quickly rolled over, Crawford left the room. Crawford's evidence at trial was that *no* event like this ever occurred.

Breverman's sua sponte obligation has no application to the latter incident, because there is *no* evidence suggesting Crawford committed *some* offense but that it was an offense less than that charged. We are also convinced *Breverman's* sua sponte obligation, even if applicable in some cases in which the defendant is charged with lewd acts on a child,[5] has no application to the former incident. Simple battery, as defined by section 242, requires a *willful* touching that is harmful or offensive. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 961.) A touching by accident, or even resulting from reckless conduct, is not battery. (*People v. Lara* (1996) 44 Cal.App.4th 102, 107-108.) Accordingly, even were Crawford's evidence credited, there would be no substantial evidence to support a battery conviction, because the only evidence was either that Crawford was guilty of the charged offense, or was not guilty of any offense. (*People v. Stewart, supra,* 77 Cal.App.4th at pp. 795-796.)

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[5] In *People v Thomas* (2007) 146 Cal.App.4th 1278, the court held *Breverman* imposed a sua sponte obligation to instruct on battery as to one of the counts alleging violation of section 288. (*Thomas,* at pp. 1291-1293.) However, the *Thomas* court examined a case in which the defendant was charged with numerous lewd acts. One of the counts alleged the defendant (alleged to have sexually touched the victim on other occasions) had committed a lewd act by coming into the basement while the victim was playing a video game and touching the victim's shoulder. (*Id*. at p. 1294.) As to *this* count, the *Thomas* court held it was prejudicially erroneous to omit the battery instruction as a lesser included offense, because it was possible this *intentional* touching was offensive but was without any lustful intent. (*Ibid*.) Here, unlike *Thomas*, Crawford's evidence was that any touching was accidental, rendering *Thomas* inapposite.

We conclude there was no evidentiary basis from which a rational jury could have found Crawford guilty of battery, and therefore there was no obligation sua sponte to instruct on battery.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.